90-1921

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHAD SEXTON, an Unmarried Infant, by and Through his Mother and Natural Guardian, MARY SEXTON, - - - - - - Petitioner

versus

BELL HELMETS, INC., A California Corporation, - - - - - - - Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does a Federal Court of Appeals' reversal of a jury verdict in favor of the Plaintiff constitute a denial of due process where the court arbitrarily and capriciously announces new products liability law which ignores and is contradicted by prevailing precedent in the forum state?

(2) Does such a reversal constitute a denial of due process where the court then denies the Plaintiff a day in court to meet the newly announced law?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the following have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Chad Sexton, an unmarried minor, by and through his mother and natural guardian, Mary Sexton
— Petitioner

2. Bell Helmets, Inc., a California Corporation
—Respondent

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No. _____

IN THE

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October Term, 1991

CHAD SEXTON, an Unmarried Infant, by and Through his Mother and Natural Guardian, MARY SEXTON, - - - - - - - - *Petitioner*

v.

BELL HELMETS, INC., A California Corporation, - - - - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner Chad Sexton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on February 5, 1991 and amended on February 26, 1991.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 926 F. 2d 331. The Opinion, as corrected, is reprinted in the Appendix at 1a.

The Order on Petition for Rehearing with Suggestion for Rehearing In Banc, denying the Petition, was entered by the United States Court of Appeals for the Fourth Circuit on March 12, 1991. An additional order denying

the Request for Certification of Question was entered on April 3, 1991. These orders are set out in the Appendix at 36a and 37a.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Sec. 1983, Petitioner brought this suit in the Southern District of West Virginia at Huntington. On November 27, 1989, the Southern District entered a judgment for Petitioner.

On Respondent's appeal, the Fourth Circuit on February 5, 1991, entered a judgment and opinion reversing the Southern District's judgment and remanding Petitioner's suit for further proceedings. The Order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's Petition for Rehearing was entered on April 3, 1991.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests upon the due process clause of the Fourteenth Amendment to the United States Constitution, which provides that:

> No state shall . . . deprive any person of life, liberty or property without due process of law . . .

STATEMENT OF THE CASE

This appeal arises from a product liability lawsuit brought by Petitioner Chad Sexton, by and through his mother, Mary Sexton, against Bell Helmets, Inc. The lawsuit was filed after Chad, then thirteen years old,

suffered brain damage and quadriparesis in a low-impact fall from a dirt bike, while wearing a Bell motorcycle helmet. Petitioner alleged that the serious and permanent brain damage was proximately caused by Bell's failure to use available designs and materials to make the helmet safe for children in low-speed impacts, thereby rendering the actual design defective and unreasonably dangerous.

Because the helmet was purchased in West Virginia, the action was brought in the U.S. District Court in Huntington. Upon motion of Bell Helmets, Inc., the District Court applied Kentucky's substantive law, since the injury occurred in Kentucky.

Petitioner proved that Chad would not have suffered brain injury if the helmet had softer, more resilient materials, including a dual-density liner. This design was available and had been used by Bell in the past. Bell's expert admitted that the contact of the helmet with the ground was a minor low-speed impact of less than ten miles per hour. Bell's documents revealed a conscious design choice to create a stiffer helmet, knowing that this would transfer more energy to the user's head and would compromise low-speed impacts.

One document, written by Bell's manager of manufacturing standards, was quoted:

> . . . This means that in a minor impact the Bell Helmet transmits a relatively high acceleration to the head—especially in comparison to many helmets approved only to the D.O.T. standard . . .

Petitioner also presented the following expert opinion evidence concerning the defective nature of Bell's design:

> 1) The helmet was defective and unreasonably dangerous because the liner was too stiff to provide the

required crush and slowing down of Chad's head in a minor impact situation.

2) The helmet was defective in that it was not tested or designed to provide a margin of safety for use by the smaller, lighter head of a developing youngster.

3) Warnings on the helmet were inadequately designed and improperly placed to alert consumers to its limitations.

4) Bell was aware as far back as the 1950s that dual-density materials would provide greater low-speed protection.

5) Patents and technology available prior to the manufacture of this helmet incorporated dual-density concepts.

At trial, Bell was given every possible legal advantage. It had the benefit of the Kentucky Product Liability Act, KRS 411.300 *et seq.*, which gave the manufacturer the benefit of several presumptions. This Act also gave Bell the advantage of a contributory negligence bar. The Court adopted this part of Kentucky law as well, although Petitioner pointed out that West Virginia law probably would not import that bar from a sister state under its conflicts principles.

Petitioner Chad Sexton overcame all of the presumptions and defenses.

The jury found:

(1) That the helmet was unreasonably unsafe for its intended use and was a proximate cause of Chad's injuries;

(2) That Bell failed to warn users of reasonably foreseeable dangers, which was also a proximate cause of Chad's injuries;

(3) That Chad was not contributorily negligent.

Testimony was presented that future care expenses were in excess of $6 million and that lost earning capacity exceeded $1.3 million.

A verdict was returned for the Petitioner in the amount of approximately $1.5 million.

Bell appealed to the United States Court of Appeals for the Fourth Circuit. In its appeal, Bell claimed that Petitioner's expert testimony was insufficient because it failed to rebut the statutory presumptions.

The Court of Appeals did not rely on any argument of Bell in concluding that the Petitioner's proof as to materials and design did not show a defect. Rather, it did so by creating a new definition of defect which required a showing of either (a) failure to comply with applicable industry standards or (b) failure to meet consumer expectations. It ignored Kentucky law in this regard, which had specifically rejected each of these prongs as a standard for defectiveness.

The Fourth Circuit panel never addressed Bell's question whether the Petitioner's proof was sufficient to rebut the statutory presumptions, except to note that the trial court had found that there was substantial evidence of defectiveness. Instead, the panel furnished Bell with a defense it had never argued. On its own initiative, it elevated consumer expectations to the level of a defense.

The Opinion concluded that the Petitioner's expert had not shown a failure to meet standards, nor had he addressed consumer expectations. Therefore, the appeals panel held the expert proof should have been stricken and not considered by the jury. The Court of Appeals therefore reversed, apparently remanding for re-trial on warnings issues.

Petitioner filed a Petition for Rehearing, Request for Certification of Question and Suggestion for Rehearing in Banc. The text of the Petition is set out in the Appendix at 22a. In that Petition, Petitioner pointed out that the Court of Appeals had rewritten Kentucky products liability law, substituting its own definition of defectiveness for the prior pronouncements of the Kentucky courts. Petitioner's argument clearly raised the contention that the Court of Appeal's action constituted a denial of Petitioner's due process rights. This issue could not have been raised prior to the filing of said motion.

On March 12, 1991, the United States Court of Appeals for the Fourth Circuit entered an Order denying the Petition for Rehearing and Suggestion for Rehearing in Banc.

REASONS FOR GRANTING THE WRIT

The Opinion of the Court of Appeals is an injustice of unusual proportion, demanding that this Court grant certiorari and undo the harm done to the Petitioner's due process rights.

In snatching Petitioner's verdict from his grasp, the Court of Appeals found it necessary to create a new definition of defect under Kentucky law:

> In short, a product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale. (Appendix 14a)

Such a holding is incredible, because *both* prongs of the Court of Appeals' newly fashioned definition have been rejected by Kentucky's courts and its legislature as defenses in products liability actions. The use of industry standards as a legal defense was rejected statutorily in

Kentucky Revised Statutes Section 411.310(2) (rebuttable presumption) and was rejected judicially in *Ingersoll-Rand Co.* v. *Rice,* 775 S.W. 2d 924, 928 (Ky. App. 1988) (undisputed compliance with standards, remanded for trial). The consumer expectation test was rejected by Kentucky's highest court in the leading products liability case of *Nichols* v. *Union Underwear Co., Inc.,* 602 S.W. 2d 429, 432 (Ky. 1980), when it said:

> . . . We now join those which have considered and rejected "patent danger" or "consumer expectation" as an absolute defense to strict liability for defective design. As Dean Wade, Reporter for the Restatement, Second, Torts, put it:
>
> > In many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no idea how safe the product could be made.

Moreover, the U.S. Court of Appeals for the Sixth Circuit, which includes Kentucky, has adopted Kentucky decisions to the effect that "defectiveness" is a question of fact involving *many* considerations, not just one or two. *Leonard* v. *Uniroyal, Inc.,* 765 F. 2d 560, 568 (6th Cir. 1985), citing *Montgomery Elevator Co.* v. *McCullough,* 676 S.W. 2d 776, 780-81 (Ky. 1984). The Opinion of the Fourth Circuit Court of Appeals in this case therefore directly contradicts the Kentucky law as found by the U.S. Court of Appeals which interprets Kentucky law on a regular basis.

This new rule fashioned by the Court of Appeals has absolutely no support in Kentucky law and no attempt was made to cite any such support. This concept was never mentioned in this case prior to the Court of Appeals' decision.

In all the years of preparation for this trial, in all the motions and hearings where Bell argued choice of law,

presumptions, contributory negligence, and instructions to the jury, never once did Bell or the court mention consumer expectations as a test under Kentucky law. Instead, Petitioner encounters a Court of Appeals which ventures into and adopts a new area of the law which was not argued and not instructed. In short, the Petitioner has been blindsided by the panel. This cannot be elementary fairness, and it should not be allowed.

Compounding the unfairness of announcing new Kentucky products liability law, the Court of Appeals also held that the testimony of Petitioner's helmet materials expert did not meet the new requirements and should be stricken, and that, upon remand, the case should be limited to retrial of warnings issues only. The Opinion on its face does not give the Petitioner a first chance, a day in court, to try to meet the new definition of defectiveness.

The unfairness of such a decision is obvious and runs against the grain of fair play inherent in the due process clause of the Fourteenth Amendment. Chad Sexton has the right, in Federal Court, to a trial of the issues under a correct application of state law, here the law of Kentucky. Second, Chad has the right to at least one day in court to try to meet the legal requirements of which he could reasonably be aware.

Chad met all of the requirements for a products liability case under Kentucky law which existed at the time of his trial. He convinced the jury that the product was unreasonably unsafe, that the warnings were inadequate, and that he was not contributorily negligent.

Now the rules have been changed, to a definition of defectiveness which the parties and the Court did not cite at trial and which they could not have foreseen. Chad is told

that he will not have a chance, a day in Court, to play by the rules as now announced. Shame on a system that would announce new requirements for a party to meet, right or wrong, and then announce that the party has lost, for failure to meet the requirements before they were announced.

It was shown at trial that a large part of Bell's consumer segment were children. This decision not only denies Chad Sexton due process, but also rewards a manufacturer who callously disregards children and the most conservative users, those involved in low-speed impacts. Even though it sells helmets for children, it protects only adults and high-speed users.

This Court has made it clear that causes of action and rights acquired by judgment are property which deserve protection under the Fourteenth Amendment's due process clause. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428-31 (1982); *Louisiana ex rel.* v. *Folsam* v. *Meyer of New Orleans*, 109 U.S. 285, 291 (1883) (Bradley, J., concurring).

The due process to which Chad Sexton was entitled includes, at a minimum, fundamental fairness. *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24-25 (1981).

Refusal of a Court of Appeals to apply consistent state law principles, as announced by the highest and intermediate state appellate courts, in a diversity case is so fundamentally unfair that it should compel this Court to review and correct the decision. *Six Companies* v. *Highway District*, 311 U.S. 180 (1940); *West* v. *American T & T Company*, 311 U.S. 223 (1940); *Stoner* v. *New York Life Insurance Company*, 311 U.S. 464 (1940). Nor is this Court of Appeals entitled to the deference of an expert tribunal, as sometimes occurs, since the controlling law is that of Kentucky, a state *outside* the Fourth Circuit.

Further, refusal to give a claimant *one* chance to meet newly created requirements for a claim is profoundly unfair. The right to a "day in court" has always been a cornerstone of due process protected by the Federal Constitution. *Mathews* v. *Eldridge,* 424 U.S. 319, 333 (1976).

One salutary effect of products liability cases is to provide significant financial incentives for an industry to increase the safety of its products. Plaintiffs' cries for industry reform are never more urgent than when the product is a safety device, whose existence has but one focus—the protection of the user. Chad sought and won a trial under existing law, the result of which would have been the increased safety of children, bicyclists, and helmet users at large. Bell's managerial decision to tolerate known dangers to children and to sell its helmets without warnings to unsuspecting buyers, justly resulted in a significant award against Bell for Chad Sexton's injuries.

Rather than affirming a jury's warning to the helmet industry, the Fourth Circuit Court raised the hurdles facing this brain damaged child after he had cleared them. Rather then taking this opportunity to encourage safer industry standards, the Fourth Circuit tells the helmet industry they can relax. Rather than affirming a verdict which could avoid untold numbers of head injuries to children, the Fourth Circuit permits and perpetuates policies which will cause them.

The Court of Appeals is saying to the industry: "Don't worry about the kids." If this Court does not grant certiorari, it is sending the same signal to the industry, that children who wear these helmets don't deserve the same level of protection as adults. It will be condoning Bell's discrimination against children, in a field where all the established standards are minimal at best and where no

standards have ever been implemented for the safety of children.

In its haste to reject the jury verdict and to create a new result-oriented standard, the Court of Appeals:

(a) rejected Kentucky law which was clearly to the contrary;

(b) totally rejected clear evidence of a defective product which satisfied prior Kentucky law;

(c) rejected evidence which, the trial court found, rebutted the presumption of non-defectiveness;

(d) approved a design which favors adults over children;

(e) approved a design which protects high-speed users over low-speed users;

(f) adopted a defense never pleaded, argued or mentioned in pre-trial proceedings, instructions or appellate briefs; and

(g) ignored substantial testimony of consumer expectations, in the testimony of Chad's mother, Mary Sexon.

After these substantial efforts to fashion new law, the Court of Appeals did not even give the victim his chance in Court. In effect, it stripped Chad Sexton of his due process rights.

Since Chad has overcome all the legal disadvantages at trial, and has convinced a jury on all instructed issues, an appellate Court should be obligated to view the evidence in the light most favorable to him. This Court of Appeals viewed all the evidence in the light *least* favorable to Chad. If it had given him the benefit of any doubt, the verdict would have been affirmed.

The record supports Chad's verdict under the law existing at the time of trial. In order to take Chad's verdict from him, the Court of Appeals had to change the law and deny Chad his basic right to a day in court. He now seeks the assistance of this Court.

CONCLUSION

Petitioner's cause of action and his favorable jury verdict were property rights protected by the Fourteenth Amendment. These rights were destroyed entirely and without due process when the Fourth Circuit Court of Appeals fashioned new Kentucky products liability law which directly contradicted Kentucky court precedent, and when it refused to permit Petitioner, on remand, to attempt to present a products liability defect case under the new law.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter Perlman, a member of the Bar of this Court, hereby certify that on this 5th day of June, 1991, two copies of the Petition for Writ of Certiorari in this case were mailed, postage prepaid, to the following parties:

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2066

CHAD SEXTON, an unmarried infant by and through his mother and natural guardian, Mary Sexton;
MARY SEXTON, Individually;
FLOYD SEXTON, Individually, - - *Plaintiffs-Appellees,*

v.

BELL HELMETS, INC., a California corporation, - - - - - *Defendant-Appellant,*

and

EAST END CIRCLE SALES, INCORPORATED, a West Virginia corporation, - - - - *Defendant.*

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Robert J. Staker, District Judge. (CA-88-989-3)

Argued: October 30, 1990 Decided: February 5, 1991
Amended by order filed February 26, 1991

Before HALL and NIEMEYER, Circuit Judges, and CACHERIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

CORRECTED OPINION

Vacated and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Hall and Judge Cacheris joined.

ARGUED: Edward Martin Kowal, Jr., Campbell, Woods, Bagley, Emerson, McNeer & Herndon, Huntington, West Virginia, for Appellant. Peter Perlman, Peter Perlman Law Offices, P.S.C., Lexington, Kentucky, for Appellees. ON BRIEF: Frank H. Fitch, III, Campbell, Woods, Bagley, Emerson, McNeer & Herndon, Huntington, West Virginia, for Appellant. Fred Fahrenz, Hunt & Wilson, Charleston, West Virginia, for Appellees.

NIEMEYER, Circuit Judge:

At dusk on December 27, 1984, in rural Kentucky, Chad Sexton, 13, was riding an off-road motorcycle (or "dirt bike") when he collided with his friend, Jackie Boggs, who was also riding a motorcycle, coming from the opposite direction. Sexton and Boggs were each traveling about 35 miles per hour, and after the collision Sexton was propelled 183 feet from the point of impact. He sustained a closed-head injury and brain damage causing quadriparesis.

At the time of the accident, Sexton was wearing a helmet manufactured by Bell Helmets, Inc., which had been purchased from a retailer in West Virginia over three years earlier, in May 1981, by his mother for his brother. The Bell helmet remained on Sexton's head throughout the accident without apparent damage except for scrape marks. Sexton and his parents sued Bell on theories of strict liability, negligence, and breach of warranty, alleging that the helmet was defectively designed and that the warning given on the helmet was inadequate. Sexton, the only remaining plaintiff at the time of trial, contends that the liner of the helmet did not crush adequately to absorb the energy from the impact and that the warning failed to disclose that the helmet was designed for an average adult, rather than a child.

From a jury verdict in favor of Sexton in the amount of $1,551,381, Bell appeals, contending (1) that the trial court

improperly failed to instruct the jury on an applicable statutory presumption; (2) that the trial court improperly refused to strike plaintiff's expert testimony and to grant defendant's motion for a directed verdict; and (3) that the court erred in refusing to find Sexton contributorily negligent as a matter of law. For the reasons that follow, we vacate the judgment and remand the case for a new trial.

I

Jurisdiction rests on diversity of citizenship, and the trial court determined that the controlling substantive law is that of Kentucky, a determination with which none of the parties takes issue.

Bell contends that the district court erred in refusing to instruct the jury on a presumption created by the Product Liability Act of Kentucky, Ky. Rev. Stat. Ann. (K.R.S.) §§ 411.300 *et seq.* (Michie 1990). The relevant portion of that act provides:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

K.R.S. § 411.310(2). Bell points out that at the time of the helmet's design in 1979 and its manufacture in 1980, three industry standards for the manufacture of helmets existed: (1) the American National Standards Institute Specifications for Protective Headgear for Vehicular Users, Z90.1-1971 (the ANSI Z90 standard); (2) the Federal Motor Vehicle Safety Standards and Regulations for Motorcycle Helmets No. 218 (FMVSS No. 218, also called the DOT standard); and (3) the Snell Memorial Foundation Stand-

ard for Protective Headgear 1975 (the Snell 75 standard). The parties agree that the helmet worn by Sexton complied with these standards and that there were no other standards applicable. Bell argues, therefore, that application of the presumption created by the Kentucky statute "*required* a verdict for Bell" and that the jury should have been so instructed. Brief of Appellant at 13 (emphasis added).

Despite Bell's argument to the contrary, the Kentucky statute does not provide that if Bell's product complied with applicable standards, Bell would be entitled to a judgment on a claim that the product was defective. Rather, the statute creates a *presumption,* which, in the absence of evidence to the contrary, will prevail. In this case, the district court concluded that substantial evidence had been presented that the product was defective, and therefore the presumption was no longer a matter to be considered. Having "burst the bubble" by the introduction of evidence, the plaintiff was entitled to have the question decided on the evidence, and the presumption was no longer applicable. *See Mason* v. *Commonwealth,* 565 S.W. 2d 140, 141 (Ky. 1978) (quoting *McCormick's Handbook of the Law of Evidence* § 345, at 821 (2d ed. 1972)).

We can perceive no reason why the trial court would ever have need to instruct the jury on this statutory presumption. If a plaintiff fails to rebut the presumption "by a preponderance of the evidence to the contrary," a verdict will be directed that the product was "not defective." K.R.S. § 411.310(2). On the other hand, if a plaintiff rebuts the presumption, the issue of whether the product was defective will be submitted to the jury on the evidence. For this reason the Kentucky courts have not generally permitted advising the jury of any presumptions except in a narrow set of circumstances not applicable here. *See Lowe* v. *McMurray,* 412 S.W. 2d 571, 574 (Ky. 1967) (general prohibition against instructing jury as to questions of

law or fact); *Mason,* 565 S.W. 2d at 141 (jury should not be informed of presumption of sanity in criminal cases). *But cf. Wells* v. *Commonwealth,* 561 S.W. 2d 85, 86 (Ky. 1978) (particular statute involving expert testimony creates a presumption of fact and jury may be informed of it).

This analysis prompts us to question the utility of such a statutory presumption, because a defendant always carries a presumption in his favor when the burden of proof is placed on the plaintiff. If the plaintiff fails to present substantial evidence to prove his case that a product was defective, the court will direct the verdict; if the plaintiff presents substantial evidence that carries him over the directed verdict threshold, the evidence will take the case to the jury and, at the same time, overcome the presumption created by the statute. The standard for rebutting the presumption under the statute, *i.e.,* by introduction of evidence that shows a defect by a preponderance of the evidence, *see* K.R.S. § 411.310(2), is the same as that which makes out a *prima facie* case for the plaintiff.

Other courts have shared our puzzlement over the need for the statute as presently drafted. *See Anderson* v. *Black & Decker (U.S.), Inc.,* 597 F. Supp. 1298, 1301 n.3 (E.D. Ky. 1984); *Ingersoll-Rand Co.* v. *Rice,* 775 S.W. 2d 924, 928 (Ky. Ct. App. 1988); *see also* J.A. 491, 499-500. If the statute was intended to mean what Bell contends, *i.e.,* that the presumption is irrebuttable, then the legislature of Kentucky will have to address the issue and modify the language of the statute. Under the statute in its present form, however, we cannot say that the district court erred in refusing to instruct the jury regarding the presumption.

II

Bell also contends that the testimony of Dr. Kenneth Saczalski and Dr. Lorna Middendorf, plaintiff's experts

who testified that the helmet was defectively designed and that the warning was inadequate, should have been stricken. Preserving the same issue by a different procedural means, Bell also contends that the court should have directed a verdict in its favor because the plaintiff did not prove either a defective design or an inadequate warning.

In the 1970's Bell redesigned its existing helmet, the Bell Star II, and produced a new helmet, the Bell Star III, the version worn by Sexton, to accommodate greater speeds and higher impacts that were anticipated in the use of helmets. The helmet was advertised for use in automobile and motorcycle racing, although it was also expected to be used on highways and for recreational use. J.A. 651. In the brochure that accompanied its helmets Bell stated:

> Your Bell helmet is designed to protect your head in two ways. It spreads the energy of a sharp impact over a wide area so that you are better able to withstand its force. Secondly, it absorbs much of the impact's energy rather than transmitting it to your head. Helmet damage after an accident does not indicate a deficiency in the helmet. On the contrary, it shows that the helmet performed its function.

Brief of Appellee at 6. The advertised performance criteria were addressed by the differing functions of the helmet's outer shell and its inner liner. The outer shell is rigid and spreads the energy of a sharp impact; the inner liner crushes under the impact in order to absorb shock. If the liner is too soft, it crushes "all the way down" and "bottoms out" and fails to absorb all of the shock. J.A. 235. On the other hand, if the liner is too stiff, it provides absorption capacity for higher impacts but fails to provide enough cushion for lesser impact collisions. J.A. 235, 242. Gradations in between provide differing levels of protection.

Bell made the decision to stiffen the liner of the Bell Star III, over its earlier version, the Bell Star II, to avoid

"bottoming out" and therefore to provide greater protection in more serious collisions. The availability of choice in design was recognized even before the 1979-80 period when the Bell Star III was designed. In 1976 Bell's manager of manufacturing standards, Jim G. Sundahl, wrote in an article:

> Bell helmets use liners having non-linear rates. They are carefully designed and molded to be relatively stiff as they begin to crush. As they are crushed further, they do not become too stiff. This means that in a minor impact the Bell helmet transmits a relatively high acceleration to the head, especially in comparison to many helmets approved only to the DOT standard. However, in a more massive impact, the Bell helmet transmits an acceleration level only a bit higher than in the lesser impact. Other helmets designed with softer liners often "bottom" at higher impact levels.

J.A. 242.

> It is interesting to note that Bell helmets could be made to more easily pass some helmet tests such as the DOT by using a softer and more resilient liner. Such a liner, however, would not provide as much protection from higher impact energy levels.

J.A. 245.

The parties agree that the Bell Star III helmet used by Sexton was not defectively *manufactured* and that its design met or exceeded the only three standards in the industry: the ANSI Z90 standard, the DOT standard, and the Snell 75 standard. They also agree that there were no special standards for helmets worn by children. J.A. 251-54.

Dr. Saczalski, who was the only witness proffered by plaintiff on whether the design of the helmet was defective,

testified that Bell improperly selected too stiff a helmet, which did not provide enough crushability for low impact situations. Summarizing his opinion, he testified, "[T]he liner in this particular helmet was too stiff to provide the crush and the slowing down of Chad's [Sexton's] head in a relatively minor impact situation. So that's my opinion." J.A. 231. While he acknowledged that the helmet in question showed some crush, he did not measure the degree of that crush and did not test the helmet in this case. J.A. 283-85. He concluded, however, that there was "very little evidence" of crush and that the impact between the helmet and the ground was a "relatively minor accident."

Focusing on Bell's conduct, he noted that Bell had various options when designing the helmet to make the liner stiffer or softer. As he stated,

> There are a number of options that a design engineer has in putting together all of these pieces or parts of this component here that are going to absorb the energy over the range that one would desire, that one would select, and for the sizes and weights that one would anticipate being used in this helmet.

J.A. 232-33. He argued that Bell made a "conscious decision" to go to a stiffer material that "would exceed or in essence be better than what would be required by, say, meeting the Department of Transportation standard." J.A. 235. This decision forms the basis of his opinion that Bell bears responsibility for the injuries suffered by Sexton because it thereby accepted the risk of low impact accidents.

Dr. Saczalski explained that technology existed to design a helmet that accommodated both higher and lower impact incidents. While no one in the industry had designed or manufactured such a helmet, Dr. Saczalski said he had built a prototype to show that it could be done. J.A. 272. He presented no evidence, however, which revealed

that Bell or the industry recognized a need for addressing lower impact situations, and he identified no standard or expectation that the Bell helmet did not fulfill. Beginning with assumptions that Sexton's collision was a low impact one and that the stiffness of the helmet was the cause of Sexton's injuries, assumptions that Bell contested, Dr. Saczalski confined his opinion to the conclusions that the technology was available and Bell therefore *"could"* have addressed the risks of Sexton's accident. J.A. 247, 311. As he testified repeatedly, "The technology was there. They were aware of it. They could have done it." J.A. 263.

Sexton argues that the testimony of Dr. Saczalski supports his claim that Bell manufactured and sold a helmet with a defective design and that the helmet was therefore unreasonably dangerous for his use. He argues that his proof of a defective condition exceeds that which was described as inadequate in *Ingersoll-Rand,* 775 S.W.2d at 929, where the court stated:

> On remand, unless Rice can present something more than a conclusion that it was theoretically probable that a different design would have been feasible and would have prevented his injury, we are of the opinion that the issue of strict liability should not be submitted to the jury.

Bell, on the other hand, argues that Dr. Saczalski's testimony amounted to no more than the type of conclusory testimony described in *Ingersoll-Rand.* It argues that Dr. Saczalski's testimony, which tended to prove only that known technology was available to protect against low impact accidents and that Bell could have utilized it to have avoided the injuries in this case, failed to prove that the product was defective.

Kentucky adopted *Restatement (Second) of Torts* § 402A in 1966 as a basis for making a claim for strict lia-

bility. *Dealers Transp. Co.* v. *Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1966). Although Kentucky also imposes the traditional duty of care on manufacturers to make products reasonably safe, when a product liability claim is based on a design defect, the articulation of liability, whether based on a negligent breach of a duty of care or on strict liability, reduces to the single question of whether the product was defective. A negligence theory focuses on the conduct of the manufacturer in adopting an allegedly defective design, and strict liability focuses on the product itself. *See Montgomery Elevator Co.* v. *McCullough*, 676 S.W.2d 776, 780 (Ky. 1984). But in either case, proof of a defective product is essential to maintaining the cause of action. As noted in *Montgomery Elevator*, "[t]he sole question in a products liability case is whether the product is defective as defined in *Nichols* v. *Union Underwear* [602 S.W. 2d 429 (Ky. 1980)]." *Id.* at 782. *See also Jones* v. *Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 69-70 (Ky. 1973) (In defective design cases, "the distinction between the so-called strict liability principle and negligence is of no practical significance."). The issue presented therefore is whether the testimony of Dr. Saczalski offered proof that the Bell Star III helmet was defectively designed.

In the leading Kentucky case addressing the question of what constitutes a defective design, *Nichols* v. *Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980), the court stated:

> We are immediately met with the difficult problem of describing the standard to which the fact finder should compare the product to decide whether it was in a "defective condition unreasonably dangerous" when sold. In *Ulrich* v. *Kasco Abrasives Company*, Ky., 532 S.W.2d 197, 200 (1976), we pointed out that the inquiry is to be made from the perspective of a "prudent manufacturer of similar products fully ap-

> prised of the condition and tendencies of the product when he put it into the stream of comerce. . . ."
>
> * * * *
>
> In design defect cases liability is founded upon the promise that the design itself selected by the manufacturer amounted to a defective condition which was unreasonably dangerous. . . .

Id. at 432-33 (footnote omitted). Although the court thus directs the inquiry to the two core elements of a strict liability claim described in *Restatement (Second) of Torts* § 402A, that the product be in a *defective condition* which causes it to become *unreasonably dangerous,* it fails to give the standard by which a condition of defectiveness is to be measured.

Although a manufacturer has a duty to design a product that is reasonably safe for its foreseeable use, the manufacturer is not required to design "the best possible product." *Jones,* 502 S.W.2d at 69. That a product in inherently dangerous, or that it creates a resk of harm, or that it causes injury does not, alone, make it defective. Some products, no matter how carefully manufactured, are inherently dangerous, and virtually every product is capable of causing injury. As is often stated, manufacturers are not insurers against all injury involving their products. *Id.* at 70. Similarly, proof that technology existed, which if implemented could feasibly have avoided a dangerous condition, does not alone establish a defect. *Id.* at 70-71. Thus, for example, automobiles in the 1950's were manufactured without seat belts, even though the technology was available for their installation. Yet, as counsel for Sexton conceded at oral argument, we would not now impose liability on the manufacturer of those automobiles on the basis that they were defective for not having seat belts.

Government and industry standards did not require them and consumers did not, at the time, demand or expect them.

It is, no doubt, significant when no one in an industry manufactures a product in a manner that a plaintiff claims is required. While conformity with industry practice is not conclusive of the product's safety, because an industry could adopt a careless standard, the cases where a member of industry will be held liable for "failing to do what no one in his position has ever done before" will be infrequent. *Jones,* 502 S.W.2d at 70 (quoting W. Prosser, *Handbook of the Law of Torts* § 33, at 167 (4th ed. 1971)). It is perhaps more significant that a reasonable purchaser does not demand or expect that the product incorporate a particular aspect of design. Thus, comment g to the *Restatement (Second) of Torts* § 402A, in explaining the "defective condition" element of strict liability, states, "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, *in a condition not contemplated* by the ultimate consumer. . . ." (Emphasis added.)

A defect can therefore be identified by measuring the product against a standard articulated expressly by government or industry or established by society in its expectations held about the product at the time of its sale. While government and industry standards are readily identifiable for a given product at a given time, the reasonable expectation of purchasers requires a factual examination of what society demanded or expected from a product. This may be proved from evidence of actual industry practices, knowledge at the time of other injuries, knowledge of dangers, the existence of published literature, and from direct evidence of what reasonable purchasers considered defective at the time. While society demands and expects a reasonably safe product, an examination of societal standards at any given point in time usually reveals an expec-

tation that balances known risks and dangers against the feasibility and practicability of applying any given technology. *See Montgomery Elevator,* 676 S.W. 2d at 780. With respect to the seatbelt hypothetical, society did not consider an automobile manufactured in the 1950's defective merely because it had no seat belts. Likewise, society does not currently expect automobiles to be manufactured to eliminate all risks of blindspots when operated in reverse. Existing technology would undoubtedly permit rearview video cameras or beeper warnings which could operate while the automobile is in reverse. Nevertheless, the automobile would not be considered defective because it is not equipped with these devices.

In short, a product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale.

There is no evidence in this case that purchasers of motorcycle helmets in the 1979-81 period, when the Bell Star III helmet was designed, manufactured and sold, reasonably expected a higher level of protection than that called for by the existing government and industry standards. There also is no evidence that purchasers of helmets expected more protection in helmets worn primarily by children than in helmets worn mainly by adults.

Furthermore, the record in the case before us reveals no government or industry standard that would have required Bell to incorporate Dr. Saczalski's prototype design into its helmets. The goals for technology at the time the Bell Star III helmet was designed were to accommodate higher impact accidents that were incidental to higher speeds. Nothing in the record suggests that focusing on higher impact accidents created an unacceptable risk for lower impact accidents. As has already been noted, the Bell Star III helmet satisfied or exceeded all three of the

existing government and industry standards. No literature was presented to indicate that anyone—industry, government, or consumers—recognized a need for greater protection in low impact accidents than that provided for by these standards.

Dr. Saczalski testified to that which *could* have been done to avoid plaintiff's injuries in this case. But that is not the equivalent of what was required to have been done. *See Ingersoll-Rand,* 775 S.W.2d at 928-29; *Jones,* 502 S.W. 2d at 70. It is true that Dr. Saczalski went beyond simply stating what could have been done; he proffered a prototype allegedly based on technology that existed in 1979. The district court relied on this in denying Bell's motion for judgment notwithstanding the verdict and for a new trial. The district court observed:

> Notwithstanding defendant's arguments to the contrary, the plaintiff's experts not only presented more than a "theoretical possibility" that a different design would have better protected the plaintiff from the injurious consequences of the accident; one of plaintiff's experts, Dr. Kenneth Saczalski, also testified as to the nature of such alternative design and to the defendant's knowledge of the feasibility of incorporating such an alternative design in its product line.

J.A. 808. The court thereby attempted to distinguish the ruling in *Ingersoll-Rand,* where the court concluded that a plaintiff, in making out a product liability case, must "present something more than a conclusion that it was theoretically probable that a different design would have been feasible and would have prevented his injury." 775 S.W.2d at 929.

Nevertheless, the fact that as of the time of trial Dr. Saczalski was able to develop a prototype using technology

available to Bell in 1979 does not lead to the conclusion that the design of the Bell Star III helmet was defective. That an alternative design was "feasible" is at best hindsight. Looking back on the progressions of technology, it is easy to fall into a mind-set of imposing current knowledge and expectations on older standards or expectations. But we cannot, under the law, judge yesterday's design by contemporary standards or expectations. For this reason, Dr. Saczalski's testimony falls short of establishing a defect, *i.e.*, an imperfection measured against a then-existing standard or reasonable consumer expectation. We conclude, therefore, that his testimony should not have been considered by the jury in rendering a verdict in this case.

Independent of the claim for defective design, Sexton contends that the warning provided by Bell of a potentially dangerous condition was inadequate. Dr. Lorna Middendorf, who provided the testimony that the warning was inadequate, stated:

> It's my opinion that that information should be on the warning or in the product instructions that children should not use this particular helmet, or this helmet is not designed to protect children, or this helmet is designed not to protect you in certain low-impact or relatively minor-impact injury situations.

J.A. 335. She concluded by stating that the warning principles that she described were "well-known and recognized by the engineering, and manufacturing and industrial community in 1979 and before." J.A. 336.

While it is apparent from a review of Dr. Middendorf's testimony that it was in part dependent on the design defect advanced by Dr. Saczalski, *see* J.A. 334-35, 349, we cannot rule as a matter of law whether she could give her opinion in the absence of Dr. Saczalski's opinion and still satisfy the requirement of Kentucky law that Bell must

have had reason to anticipate the danger omitted from its warning. *See Garrison* v. *Rohm & Haas Co.*, 492 F.2d 346, 352 (6th Cir. 1974) (citing *Post* v. *American Cleaning Equip. Corp.*, 437 S.W.2d 516 (Ky. 1968)). A new trial is therefore required for that limited purpose.

III

Finally, Bell contends that the district court erred in failing to grant its motion for a directed verdict on the issue of Sexton's alleged contributory negligence under the applicable statute. It argues that Sexton was negligent as a matter of law and that therefore it was entitled to a verdict under the Kentucky statute, which provides:

> In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

K.R.S. § 411.320(3).

Kentucky enacted the Product Liability Act in 1978 to restrict and limit common law actions for product liability. *Reda Pump Co., Div. of TRW, Inc.* v. *Finck*, 713 S.W.2d 818, 820 (Ky. 1986). The limitation adopted in K.R.S. § 411.320(3) was enacted specifically to allow for contributory negligence as a defense in product liability cases. *See Hilen* v. *Hays*, 673 S.W.2d 713, 715 (Ky. 1984). The availability of contributory negligence in this type of case had been the subject of some debate because of the traditional rule of strict liability, as embodied in *Restatement (Second) of Torts* § 402A, which precludes contributory negligence as a defense. *Id.* at comment n.

Summarizing the evidence, Bell contends that Sexton was operating an unlighted, unlicensed, unregistered, uninspected motorcycle, designed solely for off-road use, on a public highway at or near sunset. At the time of the accident Sexton was traveling near the center of the road on which Jackie Boggs was coming towards him from the opposite direction. When asked why he failed to see Jackie Boggs before the accident, Sexton replied that he "must have been looking off." J.A. 465. Bell argues that because Sexton failed to exercise ordinary care, and his failure was a substantial cause of the accident, the trial court should have directed a verdict in favor of Bell in reliance on the Kentucky statute. *See Reda Pump,* 713 S.W.2d at 820.

While the negligence of Sexton arguably may have been a contributing cause of the accident, no evidence has been advanced to show that he negligently used the helmet or that the negligent use of the helmet was a cause of his injuries. Yet both are specific requirements of the statute. It provides that "[i]f the plaintiff failed to exercise ordinary care . . . *in his use of the product*" and if *that* negligence was "a substantial cause of the occurrence that caused injury or damage" then the defendant shall not be liable. K.R.S. § 411.320(3) (emphasis added). The statute defines contributory negligence as the failure to exercise ordinary care in the use of *the product* in question.

At the time of the accident, all evidence showed that Sexton was properly wearing the Bell helmet and that it was still strapped to his head after the accident. There is no evidence to suggest that he failed to make any necessary adjustment. Therefore, the trial court did not err in refusing to instruct the jury as a matter of law that Sexton's negligence was a bar to his product liability claim under the Kentucky statute.

Although the facts do not permit a finding, as a matter of law, that Sexton was contributorily negligent as defined by K.R.S. § 411.320(3), the issue of whether Sexton's conduct amounted to contributory negligence as a matter of *common* law is a different question which we need not reach because contributory negligence is not a defense to a claim based on strict liability, *See Restatement (Second) of Torts* § 402A, comment n, except as provided by K.R.S. § 411.-320(3).

In summary, because the jury was improperly permitted to consider the testimony of Dr. Saczalski, we vacate the judgment and remand for a new trial.

VACATED AND REMANDED WITH INSTRUCTIONS

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2066
(CA-88-989-3)

CHAD SEXTON, et al, - - - *Plaintiffs-Appellees,*

v.

BELL HELMETS, INC., - - - *Defendant-Appellant.*

ORDER—Entered February 28, 1991

The Court amends its opinion filed February 5, 1991, as follows:

On page 5, first full paragraph, line 10 — the words "plaintiffs were" are corrected to read "plaintiff was."

On page 7, first full paragraph, line 2—the word "plaintiffs'" is corrected to read "plaintiff's."

On page 7, first full paragraph, line 6—the word "plaintiffs" is corrected to read "plaintiff."

On page 8, first paragraph, line 5—the phrase "Brief of Appellees" is corrected to read "Brief of Appellee."

On page 9, second full paragraph, lines 1-2—the word "plaintiffs" is corrected to read "plaintiff."

On page 11, first full paragraph, line 1—the words "The Sextons argue" are corrected to read "Sexton argues."

On page 11, first full paragraph, line 2—the word "their" is corrected to read "his."

On page 11, first full paragraph, line 4 — the name "Chad's" is corrected to read "his"; the word "They" is

corrected to read "He"; and the word "their" is corrected to read "his."

On page 13, first full paragraph, line 15 — the phrase "for the Sextons" is corrected to read "for Sexton."

On page 17, second full paragraph, lines 1-2—the phrase "the Sextons contend" is corrected to read "Sexton contends."

On page 18, second full paragraph, line 3 — the name "Chad" is omitted.

On page 18, second full paragraph, line 4 — the name "Chad" is corrected to read "Sexton."

On page 19, second full paragraph, line 1 — the name "Chad" is omitted.

On page 19, second full paragraph, lines 4, 7 and 8—the name "Chad" is corrected to read "Sexton."

On page 19, third full paragraph, line 1 — the name "Chad" is omitted.

On page 20, first full paragraph, lines 1 and 6—the name "Chad" is corrected to read "Sexton."

On page 20, second full paragraph, line 2 — the name "Chad" is omitted.

On page 20, second full paragraph, line 3 — the word "his" is corrected to read "Sexton's."

For the Court — By Direction

(s) John M. Greacen
CLERK

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Record No. 90-2066

BELL HELMETS, INC., a California Corporation, - - - - *Defendant-Appellant,*

v.

CHAD SEXTON, an unmarried infant, by and through his mother and natural guardian, MARY SEXTON; and FLOYD SEXTON and MARY SEXTON, individually, - *Plaintiffs-Appellees.*

PETITION FOR REHEARING, REQUEST FOR CERTIFICATION OF QUESTION AND SUGGESTION FOR REHEARING IN BANC

Comes now the Plaintiff-Appellee, Chad Sexton, by counsel, and for his Petition for Rehearing, Request for Certification of Question and Suggestion for Rehearing In Banc, states as follows:

I. INTRODUCTION

In the undersigned counsel's judgment, the following situations exist which require a rehearing of the appeal herein:

(a) The Opinion of the panel misapprehended and misstated Kentucky law when it adopted the "consumer expectation" test, which has been specifically rejected by Kentucky courts.

(b) The panel overlooked testimony that Bell Helmets had actually used the feasible alternative proposed by Plaintiff's expert.

(c) The Opinion of the panel overlooked testimony of reasonable consumer expectation actually presented by the Plaintiff in this case.

In adopting the "consumer expectation" test, this Court has done a grave injustice to the rights of the disabled young Chad Sexton.

The "consumer expectation" test, newly announced by the Opinion, was not mentioned previously by the trial court or by any party in briefs. The injustice is that this Court imposed a new standard which did not exist at the time of trial, still does not exist, and in fact has been *expressly rejected* by the Kentucky Supreme Court!

If Kentucky's highest court holds true to form:

(1) It will once again reject the "consumer expectation" test proposed by the panel's original Opinion, as it has already done in *Nichols* v. *Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980);

(2) It will reject the proposition that compliance with industry standards is a defense, as it was rejected statutorily in KRS 411.300 *et seq.* and rejected judicially in *Ingersoll-Rand Co.* v. *Rice*, 775 S.W.2d 924 (Ky. App. 1988).

Nothing in the panel's Opinion here suggests otherwise. This result is inconsistent with fundamental fairness and basic justice.

A correction someday, in some other case, will be too little, too late, for Chad Sexton, and all because this Court refused to consider the substantive law of Kentucky in reaching its decision. Chad will still be brain damaged and without any recourse. But *at this time*, this Court can still correct the error in its Opinion.

The decision affects the integrity and the foundation of the appellate process. An appeal is *not* an opportunity to announce new law, for a state outside the circuit, which the parties have not had a chance to brief or argue. Here, the appeals court became the place where the rules of the game changed for the first time, and a new set of rules was imposed.

It is difficult to see how everyone except the panel could have been wrong about the law in this case. The issues were tried and argued under existing Kentucky law. A thorough review of the record shows that "consumer expectation" has never been an issue or even an argument of a party. It became an issue for the first time in the panel's Opinion.

Incredibly, the Opinion ruled that the plaintiff's defect case is now foreclosed, since it did not meet the new standards announced for the first time in the Opinion!

The *worst* that should happen to Chad, is that he be given a chance to try his case under the Court's newly announced test. It does not comport with fundamental fairness to say that the plaintiff will *never* have his "day in Court" under these new rules.

There are some states, such as Maryland, where the "consumer expectation" test is part of the law. At least a Maryland plaintiff in this circuit would know the rules, would try his case under the rules, and on appeal this Court would test whether his proof met the rules.

Chad Sexton, a Kentucky plaintiff, did not have the same advantage, since the new test was announced and applied by this Court *after* trial. It is impossible to overstate the unfairness of such a holding.

II. PROCEDURAL BACKGROUND

On December 27, 1984, Chad Sexton, then age 13, suffered quadriparesis as a result of a closed head injury.

Chad was involved in a dirt bike accident with a friend, Jackie Boggs, on a rural blacktop road approximately eight miles outside of Grayson, Kentucky.

Expert witnesses presented by both parties agreed that the vertical impact between Chad's helmeted head and the road surface was a minor low-speed impact of less than 10 miles per hour. (Newman, 2 R 568, 569; Saczalski, 1 R 222-224).

Upon Bell's motion, the trial was governed entirely by the substantive law of Kentucky including Kentucky principles of contributory negligence as a bar.

The Plaintiff overcame statutory presumptions based on standards, and convinced a unanimous jury that:

(a) The helmet was defective;

(b) Warnings were inadequate; and

(c) There was no contributory negligence on his part.

The trial judge affirmed the jury's verdict; and Bell Helmets, Inc., appealed.

III. ARGUMENT

A. The Court Misapprehended and Misstated Kentucky Law When It Adopted the Consumer Expectation Test, Which has been Specifically Rejected by Kentucky Courts

In its Opinion, the panel which originally heard this appeal correctly stated that it was bound to decide this case under principles of Kentucky law, as the District Court had ruled. However, in deciding the issues on the merits, the panel concluded at page 13 that Kentucky courts had failed to define the term "defective" in products liability cases. The panel then went on to draft a definition of "defect" which required proof of (a) failure to meet

industry and government standards, or (b) failure to meet consumer expectations.

The panel's Opinion hinges almost entirely on the Court's adoption of the "consumer expectation" test, which flies directly in the face of existing Kentucky statutory and case law.

First of all, an industry standard does *not* define a defective product in Kentucky. Surprisingly, the Court noted KRS 411.300, which provides that compliance with standards creates a *rebuttable presumption,* rather than a defense. (The proof was also clear that the standards which Bell claimed to meet are *minimum standards* (1 R 252). Further, there *were* no standards for children's helmets (1 R 253). Even though children makeup 25% of Bell's market, their interests are totally ignored by Bell and by the authors of the industry standards.) Both this statute and the recent case of *Ingersoll-Rand* v. *Rice,* 775 S.W. 2d 924 (Ky. App. 1988) make it clear that compliance with standards is *not* a defense.

Secondly, Kentucky's highest court, without qualification has rejected the "consumer expectations" test. *Nichols* v. *Union Underwear Co.,* 602 S.W. 2d 429 (Ky. 1980). *See* Black, Comment, "*Nichols* v. *Union Underwear Co.* and the Meaning of 'Unreasonably Dangerous': A Call for a More Precise Standard," 69 Ky. L.J. 419, 420 (1981), pointing out that Kentucky thereby joined 22 states, a majority, which has also rejected the test.

The *Nichols* court, in rejecting "consumer expectation" as a definition of defect, said:

> We now join those which have considered and rejected "patent danger" or "consumer expectation" as an absolute defense to strict liability for defective design. As Dean Wade, Reporter for the Restatement, Second, Torts put it:

> "In many situations, particularly involving design matters, the consumer would not know what to expect, because he would have no idea how safe the product could be made."

Nichols, at p. 432.

The Court, in *Nichols,* reversed a case in which the trial judge had defined the concept of an "unreasonably dangerous" product in terms of reasonable consumer expectations. This Court has acknowledged that *Nichols* is "the leading Kentucky case" concerning defective design. (Opinion at p. 12).

The panel has pieced together, from two tests *expressly* rejected by Kentucky's statutes and courts, a *brand new after-the-fact* definition of "defectiveness."

On this basis, the Court held that the Plaintiff Chad Sexton had not met his burden of proof and remanded only on a limited warnings issue.

Kentucky has already defined an "unreasonably dangerous" product as one which a reasonable manufacturer, being fully aware of the risk (i.e., of injury to a child's head in a low-impact situation), would not have put on the market. *Nichols, supra* at 433. (Note that the manufacturer's *knowledge* of the risk is *not* an issue, but is *presumed,* in order to focus on the product and not the conduct.) This *Nichols* definition has been incorporated into the body of Kentucky jury instructions:

> As the term is used in this instruction, a product is "unreasonably dangerous" if it creates such a risk of accidental injury to a prospective user that an ordinarily prudent company engaged in the manufacture of similar products, being fully aware of the risk, would not have put it on the market.

2 Palmore, *Kentucky Instructions to Juries* Section 49.02 (1989). See also Sections 49.01 and 49.03, for instructions using the same definition.

To propose a new standard *after* trial is to, in effect, withdraw Chad Sexton's right to a jury trial.

"Consumer expectations" may define defectiveness under the law of other states such as Maryland, *Volkswagen of America, Inc.* v. *Young,* 321 A.2d 737 (Md. 1974), but it is *not* the law in Kentucky.

If this Court has any doubt as to the status of Kentucky's law, it would be appropriate to certify the question to the Kentucky Supreme Court, pursuant to Kentucky Civil Rule 76.37, rather than vacate a jury verdict and judgment based on existing Kentucky law.

This appeal should be reheard in light of a fair application of Kentucky products liability law, and the previous Opinion should be withdrawn in light of its contradiction of those Kentucky principles. The judgment of the trial court should be reinstated.

B. The Court Overlooked Testimony That Bell Helmets Had Previously Used the Feasible Alternative Proposed by Plaintiff's Expert

This appellate court is required to accept as true every fact which supports judgment and to disregard contrary evidence. *Matthews* v. *Ford Motor Co.,* 479 F. 2d 399 (4th Cir. 1973).

At page 10 of its Opinion, the panel indicates that the *only* testimony presented by the Plaintiff that feasible alternatives existed were contained in the description by the expert Dr. Saczalski that he had personally constructed a prototype incorporating safer materials.

However, the panel completely overlooked testimony that the Defendant Bell Helmets had actually used the

materials proposed by Dr. Saczalski in its own helmets in the 1950's. In fact, Dr. Saczalski's "prototype" was only a small portion of the testimony presented.

This fact came from testimony of Bell's own expert, Dr. Newman, when (at 2 R 570) Dr. Newman responded:

> Q. You agree, don't you, Dr. Newman, that a softer liner was within the state of knowledge of the helmet industry and Bell specifically in 1979 and earlier, don't you, sir?
>
> A. I believe—I stand to be corrected—they actually made a helmet with a softer liner. Sure, it's within the technology.
>
> Q. Not only was the technology known and available, but Bell had used it.
>
> A. Sure.

Further, Dr. Saczalski, plaintiff's expert, testified that the technology was known and available long before 1980 to incorporate a softer and more resilient liner. He noted that the predecessor helmet, the Bell Star II, was more resilient (1 R 310); that patents existed in 1975 for a dual-density liner which would provide protection in both low-impact and high-impact conditions (1 R 310); and Bell's own manager of manufacturing standards acknowledged in a 1976 article that Bell had the technology to design a softer and more resilient helmet (1 R 311). All of this was overlooked in the court's Opinion.

Dr. Saczalski testified that such a helmet would have protected Chad:

> Q. Would that type of helmet have offered adequate protection for a thirteen-year-old boy like Chad Sexton in an accident like this one?
>
> A. Yes, it would have. (1 R 311).

Even Bell's expert Dr. Newman, admitted that Bell was aware as far back as the 1950's that dual-density material was available and would provide greater low-speed protection (1 R 247).

It is clear that the panel overlooked this testimony, since the Opinion dwells at length on the lack of any proof that anyone in the industry had made a helmet in the manner suggested by Plaintiff's expert Dr. Saczalski.

Although the panel's Opinion repeatedly indicates that a manufacturer should not be held to present-day standards and expectations for prior products, it is certainly relevant and probative that the manufacturer in the past *did* provide just the protection which Plaintiff proposes. That is, it is certainly not expected by any reasonable consumer that a manufacturer will *decrease* the protection and safety provided by a safety device.

The Court at page 13 thought it significant when "no one" in an industry manufacturers a product in a manner that a plaintiff claims is required. These and similar quotations indicate that the Court entirely overlooked the specific testimony of Dr. Saczalski and Bell's own experts that patents and available technology existed at the time of manufacture, and that, even prior to the time of manufacture, Bell Helmets themselves had used the proposed technology.

The panel's Opinion says that plaintiffs' expert presented no evidence to show that Bell or the industry recognized the need for addressing the low-impact situation. But, unlike an automobile, this helmet is a *safety* device. Its sole purpose is protection after an impact, and this is the manufacturer's main concern. And it is obvious that a rider goes through the risk of low-speed impacts both before and after he arrives at high-speed situations. Protection at low speeds is the *most obvious* requirement for a helmet that includes recreational uses.

At page 14, the Opinion is concerned that courts should not hold one liable for "failing to do what no one in his position *has ever done before.*" Here, the Plaintiff has presented proof that in fact *this Defendant* has produced a *more protective* helmet in the past.

Such proof on the part of the Plaintiff completely changes the outcome, even given the unusual interpretation which the panel created to replace existing Kentucky law. If proper consideration is given to this overlooked testimony, the Court should hold that Plaintiff's proof was entirely adequate under Kentucky law to support the jury's verdict that the helmet was defective and was a substantial factor in causing the brain injuries to Chad Sexton.

C. The Court Overlooked Testimony of Reasonable Consumer Expectation in This Case.

As previously discussed, "consumer expectation" has been rejected as the test of defectiveness in Kentucky products liability cases. However, even if this test were correct, the panel overlooked testimony by the Plaintiff which supported, and would again support, the jury's verdict.

At page 14, the Opinion indicated that the nebulous issue of consumer expectations could be shown by (a) evidence of actual industry practices; (b) knowledge of other injuries and dangers; (c) published literature; and (d) direct evidence of what reasonable purchasers considered defective at the time. Plaintiff has presented proof at trial in all of these categories.

Evidence of actual industry practices: Dr. Saczalski noted that patents and technology in the nature of dual-density materials existed before the manufacture of this helmet (1 R 310), and he quoted Bell's own expert Dr. Newman who stated that Bell was aware as far back as the 1950's that dual-density material would provide both high-

and low-speed protection (1 R 247). Bell's expert Dr. Newman agreed that Bell had actually *used* available technology to make a softer helmet prior to the manufacture of the Bell Star III helmet.

Knowledge of injuries and dangers: Dr. Saczalski noted an article written by Jim Sundahl, Bell's manager of manufacturing standards. This article noted that "[i]n a minor impact the Bell helmet transmits a relatively high acceleration to the head, especially in comparison to many helmets approved only to the DOT standards."

Published literature: The Sundahl article has been noted. There were also articles quoted by Dr. Klim concerning the nature of the skull structure of children. These latter articles were available to Bell and indicated that skull structures were still forming in 13-year-old children, requiring increased protection. (2 R 392-3).

Specific consumer expectations: Mary Sexton testified: "I thought—when I bought the helmet I thought that it would protect—well as I said, my son Darren from a head injury. That was why I bought it." (1 R 147). This is testimony from a relevant consumer, Chad's mother, concerning her own expectations.

These elements of proof, presented by the Plaintiff at trial, were sufficient to support the jury's verdict in favor of the Plaintiff, even if the panel's newly-created requirements of proof concerning "consumer expectations" is correct as applied. The decision of the jury should be properly affirmed on rehearing.

Alternatively, if the case is to be remanded, it should properly be remanded for re-trial of the defect issues, since there was sufficient proof on which the jury could base its decision, even absent Dr. Saczalski's expert opinion as to the defectiveness of the helmet.

IV. RELIEF SOUGHT

First, this Court should recognize the misapprehended Kentucky law and the overlooked proof, and affirm the trial court's Judgment, reflecting that the plaintiff overcame the hurdles of contributory negligence and statutory presumptions, and convinced the jury with proof that met the then-existing requirements of Kentucky law.

Second, if the Court is unclear as to the Kentucky law in this area of products liability, the issue should be certified to the Kentucky Supreme Court, pursuant to Kentucky Civil Rule 76.37.

Finally, if the Court is not willing to either affirm or certify, it should at least permit the Plaintiff to try both the *defect* case and the *warnings* case under the newly announced requirements, when the Plaintiff never had a chance to do so under these new rules.

Basic principles of fundamental fairness demand that Chad Sexton be given his day in court under the new rules as interpreted by this Court. Even though due process under the Fifth and Fourteenth Amendments cannot be precisely defined, it certainly requires fundamental fairness. *Lassiter* v. *Department of Social Services,* 452 U.S. 18, 24-25 (1981). Retroactive application of a newly announced judicial standard *cannot* be fundamentally fair.

V. SUGGESTION OF NEED FOR REHEARING IN BANC

This case should be heard by the entire Court of Appeals sitting in banc, pursuant to FRAP 35.

Such a rehearing is necessary *both* to maintain the uniformity of this Court's ruling and in light of the exceptional importance of this issue.

This Court has often noted that cases from the district courts must be decided in accordance with the prevailing

law. In this case, the panel Opinion directly adopts tests and definitions which have been expressly rejected by Kentucky's highest court. Uniformity demand that the entire Court rehear this appeal, since the panel's Opinion allows the contrary law of other foreign jurisdictions to govern this case.

Second, this case has an importance beyond even its obvious importance to the young disabled plaintiff, Chad Sexton. By announcing the *previously rejected* "consumer expectation" test, and by striking expert testimony which clearly met the requirements of previous Kentucky cases, this Opinion threatens to throw into disarray all of Kentucky's product liability law. The present state of the law has been hammered out over many years by the Kentucky courts. An Opinion which has the potential to wreak havoc throughout an entire state's legal structure is certainly of exceptional importance, and deserving of the entire court's attention.

For these reasons, this case should be heard in banc.

VI. CONCLUSION

Chad Sexton suffered severe brain damage when his Bell Star III helmet failed to protect his head in a minor impact. He overcame every obstacle at trial, under the most difficult scenario possible. He met every burden imposed by existing state law, which included overcoming statutory presumptions as well as the hurdle of contributory negligence. He won.

Now the panel remands for failure to comply with a standard which was not in effect at the time and which, in fact, had been specifically rejected by Kentucky's highest court. If this result is allowed to stand, it would mean a panel of the Fourth Circuit would impose substantive law on the State of Kentucky which is inconsistent with Kentucky's own substantive law.

This Court has all the power in the world to control the outcome of these proceedings. Chad has none. The Court should not erect hurdles which the controlling jurisdiction has rejected, when those hurdles will take away Chad's hard-won award, gained under the rules as they existed at the time of trial.

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2066

CHAD SEXTON, an unmarried infant by and through his mother and natural guardian, Mary Sexton; MARY SEXTON, Individually; FLOYD SEXTON, Individually - - *Plaintiffs-Appellees*

v.

BELL HELMETS, INC., a California corporation - - - - - - - - *Defendant-Appellant*

AND

EAST END CYCLE SALES, INCORPORATED, a West Virginia corporation - - - *Defendant*

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC—Filed March 12, 1991

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Niemeyer with the concurrence of Judge Hall and Judge Cacheris.

For the Court,
John M. Greacen
Clerk

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v.

BELL HELMETS, INC., a California corporation - - - - - - - *Defendant-Appellant*

AND

EAST END CYCLE SALES, INCORPORATED, a West Virginia corporation - - - *Defendant*

ORDER—Filed April 3, 1991

With his petition for rehearing and suggestion for rehearing in banc, appellee filed a request for certification of question.

IT IS ORDERED that the request for certification is denied.

Entered at the direction of Judge Niemeyer for a panel consisting of Judge Hall, Judge Niemeyer and Judge Cacheris.

For the Court—By Direction

John M. Greacen
Clerk

PRODUCT LIABILITY ACT

411.300. Definitions. — (1) As used in KRS 411.310 to 411.340, a "product liability action" shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product.

(2) As used in KRS 411.310 to 411.340, a "plaintiff" shall mean a person asserting a claim and, if said claim is asserted on behalf of an estate, "plaintiff" shall include plaintiff's decedent. (Enact. Acts 1978, ch. 91, § 2, effective June 17, 1978.)

411.310. Presumptions in product liability actions. — (1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.

(2) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured. (Enact. Acts 1978, ch. 91, § 3, effective June 17, 1978.)

411.320. Circumstances under which defendant is liable. — (1) In any product liability action, a manufacturer shall be liable only for the personal injury, death or prop-

erty damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in accordance with specifications or instructions furnished by the manufacturer.

(2) In any product liability action, if the plaintiff performed an unauthorized alteration or an unauthorized modification, and such alteration or modification was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

(3) In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a susbtantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective. (Enact. Acts 1978, ch. 91, § 4, effective June 17, 1978.)

411.330. Admissibility of certain evidence. [For effective date of repeal of this section see Compiler's Notes.] — In any product liability action, evidence of any alteration, modification, improvement, repair or change in or discontinuance of the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instruction, marketing, advertising, packaging, or labeling of a product, whether made by the defendant or any other person or entity after the date of manufacture, shall be admissible in evidence only after the same has been offered to the court

in a hearing out of the presence of the jury and the court has ruled that the evidence is relevant and material. (Enact. Acts 1978, ch. 91, § 5, effective June 17. 1978.)

411.340. When wholesaler, distributor or retailer to be held liable. — In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user on consumer. (Enact. Acts 1978, ch. 91, § 6, effective June 17, 1978.)

411.350. Short title. — KRS 411.300 to 411.340 shall be known as the "Product Liability Act of Kentucky." (Enact. Acts 1978, ch. 91, § 1, effective June 17, 1978.)

AMENDMENT XIV

[CITIZEN'S RIGHTS]

Section I. Citizenship; Due process; Equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.